Menk Sdn Bhd v Joerg Hugo Schmidt

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–480 OF 2007
SURIYADI, ZAINUN ALI AND AHMAD MAAROP JJCA
19 DECEMBER 2008

Civil Procedure — Injunction — Mareva injunction — Appeal against granting of injunction — Whether requirements for granting Mareva injunction satisfied — Whether trial judge committed error of law and misconceived facts — Whether injunction would be oppressive against appellant — Whether real risk of assets being dissipated

The plaintiff/respondent was employed as a general manager in the defendant/appellant company, a subsidiary of Menk Apparatebau GmbH of German. The contract of service provided, inter alia, that the relationship should end at the month ending upon the respondent reaching the age of 63 or upon his claim of pension of occupational disability or invalidity. The respondent had further averred that the appellant's representative had repeatedly affirmed that his employment with the appellant was secure and would continue as long as the appellant continued to generate profits. On 1 October 2002, the respondent commenced employment with the appellant and further, on 9 February 2006, his employment pass was extended for a maximum period of five years to 16 January 2011. Disgruntlement surfaced when the respondent was served with a notice dated 22 June 2006, notifying him that the contract of service would be terminated upon the expiry of three months period ie on 30 September 2006. At that time, the respondent was only 49 years old and going by the terms of the contract, he still had a 14 good years left to serve. The respondent commenced a suit in the High Court against the appellant for damages of RM4,335,064.43, for losses suffered by him for the period between October 2006 until 23 August 2019, or damages to be assessed with interests. As there was a real risk that the appellant would dissipate or remove all its assets in Malaysia and relocate to China, beginning March 2007 ie, before the civil suit was determined, the respondent had, on 30 January 2007, obtained an ex parte Mareva injunction over the appellant's assets to the extent of RM4.5m. The appellant filed an application to set aside the ex parte Mareva injunction order. The application which was heard by the trial judge inter parte had affirmed the respondent's application. Being dissatisfied with the said decision, the appellant thereupon filed this appeal. The appellant's main complaints centered on the ground that the court had incorrectly equated the identification of a serious issue to be tried, as

establishing a good arguable case, with the question of whether a breach of the contract of employment had occurred as that was a serious issue. Further it was contended that the learned judge had erred in holding that there was a real risk that the appellant would dissipate its assets and so stultifying a judgment.

Held, allowing the appeal with costs here and below:

(1) In order to succeed in satisfying the requirement of a good arguable case, much depends on the circumstances of the case, and invariably will depend on the available evidence, normally gleaned from the affidavits. Whether there were any assets within the jurisdiction likewise will depend very much on factual evidence, though more often than not, defendants are more co-operative on this matter. The issue of risk of whether the assets will be removed from the Malaysian jurisdiction before judgment is satisfied was more difficult to prove, and issues of probity may arise. It may touch on the conduct of the defendant, the clandestine manner the assets are being removed and the like (see para 19).

(2) In this case, the learned judge had opined and equated the existence of a serious question to be tried, which was connected to the contract of service requiring a full-blown trial, with a good arguable case. This opinion was a misdirection as he had stopped short at that. The learned judge should have taken the extra step of assessing the facts and thenceforth arrive at a finding whether a good arguable case had been established (see para 22).

(3) To arrive at a finding that a case is arguable, let alone a good arguable case, a judge hearing a Mareva injunction application must assess the available evidence beforehand. Unless that was done, the presiding judge will be unable to decide whether the applicant has a fair chance of obtaining judgment, if the matter were to go for trial. Here there was absence of any finding of the chances of the respondent's case, and even if the grounds of judgment were not a talking judgment, the learned judge certainly had failed to assess the strength of his case. By this failure, the learned judge here could not have been able to decide whether the applicant had established a good arguable case or not (see paras 26 & 29).

(4) It was never denied that the appellant had assets in Malaysia. Further, it was not denied that relocation to China was in the offing. Regretfully the learned judge had oversimplified matters by concluding that just because relocation was in the offing, even though openly admitted by the appellant, by the dissipation of the assets a default of a judgment

must necessarily follow. That was not how the law works. First there must be a factual finding exercise. The learned judge needs to be subjectively satisfied that the injunction was to prohibit the dissipation of assets by the appellant in order to avoid any danger of the appellant defeating a judgment. However, there was not a shred of evidence to establish that the disposal of the assets was with the intention of stultifying any judgment or with the effect of defeating a claim (see para 33).

[Bahasa Malaysia summary

Plaintif/responden telah diambil bekerja sebagai pengurus besar di syarikat defendan/perayu, sebuah anak syarikat Menk Apparatebau GmbH dari Jerman. Kontrak perkhidmatan memperuntukkan, antara lain, bahawa hubungan akan berakhir pada bulan yang mana responden telah mencapai usia 63 tahun atau apabila beliau menuntut untuk pencen akibat ketakdayaan dan ketidakupayaan beliau untuk bekerja. Responden selanjutnya menyatakan bahawa wakil perayu telah berulang kali mengesahkan bahawa pekerjaannya dengan perayu adalah terjamin dan akan terus bekerja selagi mana perayu berterusan menjana keuntungan. Pada 1 Oktober 2002, responden telah memulakan pekerjaannya dengan perayu dan selanjutnya, pada 9 Februari 2006, pas pekerjaannya telah dilanjutkan bagi tempoh maksimum lima tahun sehingga 16 Januari 2011. Ketidakpuasan hati timbul apabila responden telah diserahkan dengan notis bertarikh 22 Jun 2006, memaklumkan bahawa kontrak perkhidmatannnya akan ditamatkan selepas tamat tempoh tiga bulan iaitu pada 30 September 2006. Ketika itu, responden baru berusia 49 tahun dan berdasarkan kepada terma-terma kontrak, beliau masih mempunyai cukup 14 tahun untuk berkhidmat. Responden telah memulakan tindakan guaman di Mahkamah Tinggi terhadap perayu bagi ganti rugi sebanyak RM4,335,064.43, untuk kerugian yang ditanggung olehnya untuk tempoh antara Oktober 2006 sehingga 23 Ogos 2019, atau ganti rugi yang akan ditaksirkan bersama dengan faedah. Memandangkan terdapat risiko besar perayu akan membawa keluar keseluruhan asetnya dalam Malaysia dan menempatkannya di China, bermula Mac 2007 iaitu sebelum guaman sivil ditentukan, responden telah, pada 30 Januari 2007, mendapatkan satu perintah ex parte injunksi Mareva terhadap aset perayu sehingga RM4.5j. Perayu memfailkan permohonan untuk mengetepikan perintah injunksi Mareva ex parte. Permohonan yang didengar oleh hakim bicara secara inter parte telah mengesahkan permohonan responden. Tidak berpuas hati dengan keputusan tersebut, perayu kemudiannya memfailkan rayuan. Aduan utama perayu tertumpu kepada alasan bahawa mahkamah telah tersilap menyamakan pengenalpastian isu serius yang perlu dibicarakan sebagai membuktikan kes yang baik untuk diperdebatkan, dengan persoalan sama ada kemungkiran kontrak pekerjaan

telah berlaku kerana ia merupakan isu serius. Selanjutnya, adalah ditegaskan bahawa hakim terpelajar telah khilaf dalam memutuskan bahawa terdapat risiko sebenar bahawa responden akan membawa keluar aset-asetnya dan oleh sebab itu akan mensia-siakan penghakiman.

Diputuskan, membenarkan rayuan dengan kos di sini dan di Mahkamah Tinggi:

(1) Untuk berjaya dalam memenuhi keperluan bagi satu kes yang baik untuk diperdebatkan, ia bergantung kepada keadaan-keadaan sesuatu kes, dan selalunya bergantung kepada keterangan yang ada, kebiasaannya berpandukan kepada afidavit-afidavit. Sama ada terdapat apa-apa aset dalam bidang kuasa demikian akan bergantung kepada keterangan fakta, walaupun tidak selalu begitu, defendan-defendan sangat memberikan kerjasama dalam perkara ini. Isu risiko sama ada aset-aset akan dibawa keluar dari bidang kuasa Malaysia sebelum penghakiman dilaksanakan adalah sukar dibuktikan, dan isu-isu kejujuran yang tidak diragui akan timbul. Ia akan menyentuh perlakuan defendan, secara sulit aset-aset dibawa keluar dan seumpama dengannya (lihat perenggan 19).

(2) Dalam kes ini, hakim yang bijaksana berpendapat dan menyamakan kewujudan persoalan serius untuk dibicarakan, yang berkaitan dengan kontrak perkhidmatan memerlukan perbicaraan penuh, dengan kes yang baik untuk diperdebatkan. Pendapat ini adalah satu salah arah kerana beliau berhenti setakat itu sahaja. Hakim yang bijaksana harus mengambil langkah yang lebih jauh dengan menilai fakta-fakta dan kemudiannya membawa kepada keputusan sama ada satu kes yang baik untuk diperdebatkan telah dibuktikan (lihat perenggan 22).

(3) Bagi mencapai keputusan bahawa kes ini adalah dipertikaikan, apatah lagi satu kes yang baik untuk diperdebatkan, hakim yang mendengar permohonan injunksi Mareva hendaklah menilai keterangan terlebih dahulu. Melainkan ia telah dibuat, hakim yang membicarakan tidak akan dapat memutuskan sama ada pemohon mempunyai satu peluang yang adil bagi mendapatkan penghakiman, jika perkara diteruskan dengan perbicaraan. Di sini, terdapat kekosongan terhadap dapatan peluang-peluang kes responden, dan walaupun alasan penghakiman bukannya penghakiman yang baik, hakim bicara sudah tentu gagal untuk menilai kekuatan kesnya. Dengan kegagalan ini, hakim bicara tidak akan dapat membuat keputusan sama ada pemohon telah membuktikan satu kes yang baik atau tidak untuk diperdebatkan (lihat perenggan 26 & 29).

A (4) Tidak pernah dinafikan bahawa perayu mempunyai aset di Malaysia. Selanjutnya, tidak dinafikan bahawa penempatan semula ke China akan dibuat tidak lama lagi. Amat dikesali bahawa hakim yang bijaksana mempermudahkan perkara tersebut dengan menyimpulkan bahawa hanya kerana penempatan semula tidak lama lagi, walaupun secara
B terbuka diakui oleh perayu, dengan hilangnya aset-aset satu penghakiman ingkar hendaklah dibuat kepadanya. Ia bukanlah sebagaimana fungsi perundangan. Pertama mesti menggunakan dapatan fakta. Hakim terpelajar perlu berpuas hati secara subjektif bahawa injunksi adalah untuk menghalang kehilangan aset-aset oleh
C perayu bagi mengelakkan sebarang bahaya perayu akan mengatasi penghakiman. Walau bagaimanapun, ia bukanlah sesuatu keterangan yang kecil bagi membuktikan bahawa penghapusan aset-aset adalah dengan niat untuk mensia-siakan sebarang penghakiman atau dengan sebab menggagalkan sesuatu tuntutan (lihat perenggan 33).]

D

Notes

For cases on Mareva injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3457–3534.

E **Cases referred to**

Ace King Pte Ltd v Circus Americano Ltd & Ors [1985] 2 MLJ 75, HC (refd)

Allen v Jambo Holdings [1980] 2 All ER 502, CA (refd)

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97, SC (refd)

F *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1; [1998] 4 CLJ 754, CA (refd)

CBS United Kingdom Ltd v Lambert & Anor [1982] 3 All ER 237 (refd)

Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153, SC (refd)

G *European Grain & Shipping Ltd v Compania Naviara Euro-Asia SA & Ors* [1990] 2 MLJ 291, HC (refd)

Mareva Compania Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509 (refd)

Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG [1984] 1 All ER 398, QBD (refd)

H

Pacific Centre Sdn Bhd v United Engineers (Malaysia) [1984] 2 MLJ 143, HC (refd)

Seema Development Sdn Bhd v Mah Kim Chye & Anor [1997] MLJU 235; [1998] 1 CLJ 174, HC (refd)

I *'The Nagasaki Spirit'; owners of cargo Laden or lately Laden on board the ship or vessel 'Ocean Blessing' v Owners of the ship or vessel 'Nagasaki Spirit' (No 1)* [1994] 1 SLR 434, HC (refd)

Third Chandris Shipping Corporation v Unimarine SA [1979] QB 645, CA (refd)

Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 260, FC (refd)
Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 40, HC (refd)

Legislation referred to
Rules of the High Court 1980 O 29

Appeal from: Civil Suit No MT1–22–19 of 2007 (High Court, Johor Bahru)

Edward Saw (LK Mak with him) (YH Teh & Quek) for the appellant.
Mahathir Abdullah (Raslan Loong) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] This appeal was allowed with costs by this panel, and we thereupon had set aside the Mareva injunction ordered by the High Court against the defendant, hereinafter referred to as the appellant. We now recap the facts.

[2] By a contract of service dated 16 August 2002 the plaintiff (hereinafter referred to as the respondent), was employed as a general manager in the appellant company, which is a subsidiary of Menk Apparatebau GmbH of German, with a salary of RM18,000 per month together with a month's contractual bonus. He was also entitled to a monthly entertainment allowance of RM4,500, accident insurance coverage of RM864,000, medical insurance coverage of RM3,000, hospitalisation and surgical insurance premium of RM17,482.87 with Allianz Worldwide Care, profit sharing of 1% on the company's audited annual profit and the use of a company car, inclusive of toll and petrol.

[3] Amongst the terms of the contract were that the employee-employer relationship shall end at the month ending upon the respondent reaching the age of 63 or upon his claim of pension of occupational disability or invalidity. The respondent had further averred that the appellant's representative ie one Mr Otto Karl Gross had repeatedly affirmed that his employment with the appellant was secure and will continue as long as the appellant continued to generate profits. The respondent commenced employment with the appellant on 1 October 2002. Later the appellant had his employment pass extended for a maximum period of five years from 9 February 2006 to 16 January 2011.

A **[4]** Disgruntlement surfaced when on 22 June 2006 the respondent was served with a notice, also dated the same day, notifying him that the contract of service would be terminated upon the expiry of three months period ie on 30 September 2006. At that time, the respondent was only 49 years old and going by the terms of the contract, he still had a 14 good years left to serve.

B

[5] The respondent commenced a suit ie, Civil Suit MT-22–19 of 2007 on 19 January 2007 in the High Court at Johor Bahru against the appellant for damages of RM4,335,064.43, for losses suffered by him for the period between October 2006 until 23 August 2019, or damages to be assessed with
C interests. On 19 January 2007, the respondent filed an application, as per encl 4, for a Mareva injunction over all the assets of the appellant to the extent of RM4.5m. On 30 January 2007 he succeeded in obtaining an ex-parte injunction against the latter.

D

[6] On 9 February 2007, the appellant filed an application to set aside the ex-parte Mareva injunction order. On 26 March 2007 the learned judge heard the respondent's application of encl 4 for the Mareva injunction inter parte together with the setting aside application.

E

[7] Having heard the matter the learned judge allowed the respondent's application for the Mareva injunction. He had concluded as per his judgment that:

F (i) the respondent had successfully proven a good arguable case. He authored that the serious question in the nature of the contract of service being a long-term one, and whether a breach of it had taken place, and required to be addressed by a full-blown trial, was the foundation of a good arguable case;

G (ii) whether German or Malaysian law applied in this case, also fell within the realm of question of fact, which could only be determined at trial, hence establishing a good arguable case; and

(iii) no fortification was required to fortify his undertaking. On this issue
H the learned judge had alluded to *Allen v Jambo Holdings* [1980] 2 All ER 502 CA in support of that stand, where an undertaking was not required of a poor plaintiff. This case was also referred to in *Seema Development Sdn Bhd v Mah Kim Chye & Anor* [1997] MLJU 235; [1998] 1 CLJ 174 HC.

I

[8] The appellant being dissatisfied with the decision had thereupon filed this appeal. The appellant's main complaints centered on the ground that the court had:

(1) incorrectly equated the identification of a serious issue to be tried, as

establishing a good arguable case, with the question of whether a breach of the contract of employment had occurred as that serious issue; and

(2) erred in holding that there was a real risk that the appellant would dissipate its assets and so stultifying a judgment.

[9] The respondent's approach towards the establishment of a good arguable case, as reflected from the pleadings and notes of proceedings, very much depended on the interpretation of his contract of service. He ventilated that he had a long-term contract of service, and the provision as to termination in cl 2.2 was subject to cl 2.3, in that the three months notice period was predicated by the requirement of just cause and excuse being established. By terminating the contract of service on 22 June 2006, the appellant had breached the respondent's legitimate expectation that the contract of service would continue until he attains the age of 63. Due to the termination, he suffered losses and damages, in the like of salary and benefits amounting to RM4,335,064.

[10] He further canvassed that the appellant's termination of the contract of service was mala fide, in that it was to facilitate its closing down operations in Malaysia. There was a real risk that the appellant would dissipate or remove all its assets and landed properties in Malaysia, beginning March 2007, before the civil suit was determined. The appellant in fact had conceded that they were moving out of Malaysia.

[11] The respondent canvassed that there were thus serious issues to be tried, in particular whether there was a breach of the express terms of the contract of service by the appellant, when it prematurely and wrongly terminated the employment contract before the age of 63. The side issue of delay in the application could not be taken against him as he only knew of the company's intention to cease operations in Malaysia, and relocate to China, sometime in March 2007. The exchange of e-mails between the members of the inner circle of the company, of the intention to relocate never was made known to him ('JSH8'). The respondent further contended that the balance of convenience tilted towards him, as his losses exceeded that of the appellant in the event were he to be deprived of the fruits of litigation, let alone he had given an undertaking on damages as reflected in the application.

[12] The appellant had countered that cl 2.2 was not subject to clause 2.3, in that the notice provision of three months in cl 2.2, merely relates to termination by notice whereas cl 2.3 was in regard to summary dismissal. For easy reference we reproduce the relevant clauses:

A Clause 2.2

The employment contract may be terminated by either party with three months notice required, at the end of a quarter.

If termination is proposed by either party, it has to be given in writing. The
B termination notice is properly served, if the receiver receives the written termination notice before the commencement of the termination period.

Menk is authorized, in the event of termination notice given by either party and for any reason, to relieve the employee of his duties and to pay him the salary until the end of the termination period. Any leave due is taken into account for this
C period.

Clause 2.3

The employment contract may be terminated by either party, if important reasons prevail, through extraordinary termination.

D Clause 2.4

The probation period is six months and during this period either party may terminate the employment contract with one month notice, at the end of a month.

E **[13]** By reason of cl 12.4, the contract of service was subject to German labour law and since German law prohibits claim for damages the plaintiff's suit was unsustainable for a Mareva injunction. In fact the appellant had emphasised that it was under no obligation to furnish reasons for the termination. It further averred that there was delay in the making of the
F application for injunctive reliefs in January 2007 as the respondent already had knowledge of the appellant's intention to relocate their operations to China as early as November 2006.

REASONS FOR ALLOWING THE APPEAL

G

[14] Before delving into the provided facts, and whether the Mareva injunction should have been granted, it would be beneficial if certain ground rules and appreciation of the law regarding an injunction of this nature be
H laid down. The Mareva injunction obtained its name from *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, with the heart and core of that injunction being granted purposefully to restrain the defendant from removing its assets from the jurisdiction and stultifying any judgment given by the court. Lord Denning at p 510 in the above case had
I observed:

> If it appears that the debt is due and owing — and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment — the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the

exercise of this jurisdiction. There is money in a bank in London which stands in the name of these time charterers. The time charterers have control of it. They may at any time dispose of it or remove it out of this country. If they do so, the ship owners may never get their charter hire. The ship is now on the high seas. It has passed Cape Town on its way to India. It will complete the voyage and the cargo discharged. And the ship owners may not get their charter hire at all. In face of this danger, I think this court ought to grant an injunction to restrain the defendants from disposing of these moneys now in the bank in London, until the trial or judgment in this action. If the defendants have any grievance about it when they hear of it, they can apply to discharge it. But meanwhile the plaintiffs should be protected. It is only just and right that this court should grant an injunction.

[15] It can safely be stated that the earliest attempt made for this form of injunction in Malaysia was before Hashim Yeop Sani J in *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 40 but was dismissed, on the premise that it had no place here. The Federal Court on appeal, in *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260 had held otherwise. It ruled without reservation that the High Courts in Malaysia indeed had jurisdiction to grant this order. Raja Azlan Shah CJ (Malaya) (as HRH was) had said:

The Mareva injunction is an established feature of English law. The English courts have provided guidelines in the scope, logistics and machinery of the Mareva injunction. It is a copy book example of the consequences of judicial intervention by way of a new doctrine. It is an injunction granted ex parte against defendant in a pending action *to restrain him from removing assets from and now even dissipating them within the jurisdiction and so stultifying any judgment in favour of the plaintiff.* It has been steadily widened so that it is now available in a personal injury claim. (Emphasis added.)

[16] In *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 the Supreme Court had reaffirmed the legal position and the powers of superior courts to grant this remedy when it said the following:

The decision in *Zainal Abidin* has been followed in *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd*, (3) *Ace King Pte Ltd v Circus Americano Ltd & Ors* (4) and in *S & F International Limited v Trans-Co Engineering Sdn Bhd* (5) There should be no doubt now that the Mareva remedy is here to stay. The issue of jurisdiction has been discussed thoroughly in all the cases cited, and with respect we are not persuaded that our courts have no jurisdiction to do what is just by way of Mareva injunction.

[17] The above case of *Aspatra Sdn Bhd* had described the need to issue this remedy, in order to keep the assets of a 'foreign defaulter' within jurisdiction, to prevent injustice caused to a successful litigant. The aim of such an injunction is not to provide a plaintiff with security of claim but to restrain

a defendant from putting his assets out of the plaintiff's reach, in order to defeat a judgment (*Injunctions and Companies*, by Nasser Hamid; *'The Nagasaki Spirit'; owners of cargo Laden or lately Laden on board the ship or vessel 'Ocean Blessing' v Owners of the ship or vessel 'Nagasaki Spirit' (No 1)* [1994] 1 SLR 434; *European Grain & Shipping Ltd v Compania Naviara Euro-Asia SA & Ors* [1990] 2 MLJ 291).

[18] It is thus now quite established that, in order to succeed in a Mareva injunction application, a plaintiff must establish:

(i) a good arguable case;

(ii) that the defendant has assets within the jurisdiction; and

(iii) that the assets were being disposed intentionally or have the effect of stultifying any judgment in favour of the plaintiff (*Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97; *Ace King Pte Ltd v Circus Americano Ltd & Ors* [1985] 2 MLJ 75; *Pacific Centre Sdn Bhd v United Engineers (Malaysia)* [1984] 2 MLJ 143: *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153).

[19] In order to succeed in satisfying the above requirement of a good arguable case, much depends on the circumstances of the case, and invariably will depend on the available evidence, normally gleaned from the affidavits. Whether there is any asset within the jurisdiction likewise will depend very much on factual evidence, though more often than not, defendants are more co-operative on this matter. The issue of risk of whether the assets will be removed from the Malaysian jurisdiction before judgment is satisfied, is more difficult to prove, and issues of probity may arise. It may touch on the conduct of the defendant, the clandestine manner the assets are being removed and the like. In *CBS United Kingdom Ltd v Lambert & Anor* [1982] 3 All ER 237 Lawton LJ at p 242 had remarked:

> In my judgment an affidavit in support of a Mareva injunction should give enough particulars of the plaintiff's case *to enable the court to assess its strength* and should set out what inquiries have been made about the defendant's business and what information has been revealed, including that relating to its size, origins, business, domicile, the location of its known assets land the circumstances in which the dispute has arisen. *These facts should enable a commercial judge to infer whether there is likely to be any real risk of default* … (Emphasis added.)

[20] In a gist there must be some facts upon which the court can properly infer that there is a real danger of the defendant dodging satisfaction of a judgment (*Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645). Needless to say before any inference is made the learned judge is required to assess the evidence first.

[21] During the appeal, the number of grounds were reduced tremendously and focus was concentrated on the misdirection of the judge on the issue of a good arguable case, and the unproved issue of the dissipation of the assets leading to a real risk of a default in the satisfaction of a judgment. Now forewarned we shall attempt not to stray outside those indicated parameters.

A GOOD ARGUABLE CASE

[22] Scrutinising the judgment of the learned judge, he had opined and equated the existence of a serious question to be tried, which was connected to the contract of service requiring a full-blown trial, with a good arguable case. We viewed this opinion as a misdirection as he had stopped short at that. The learned judge should have taken the extra step of assessing the facts and thenceforth arrive at a finding whether a good arguable case had been established.

[23] As stated much earlier, in order to succeed in a Mareva injunction application, a plaintiff must establish for starters a good arguable case. What is arguable has to be in relation to the whole case and not some isolated minor issue or supplementary argument. As an example, the learned judge here had posed the supplementary question as regards the law applicable ie whether it be German or Malaysian. He said, since it fell within the realm of question of fact, it could only be determined at a full trial, whereupon he remarked that with that latter issue left unresolved a good arguable case thus was established. Not only a wrong test had been applied again, but to elevate and equate this issue of choice of law, which is a supplementary argument with the concept of a good arguable case, would militate against the law of Mareva injunction as prognosed in the preceding paragraphs. A good arguable point does not tantamount to a good arguable case; the totality of points may qualify as a case. On the other hand, lest this panel be accused of oversimplification, we are not unmindful that if a point on its own may lead to the applicant having a fair chance of success, then it cannot be minor or purely supplementary.

[24] Having perused the evidence, especially the contract of service, it was this panel's view that parties had agreed that the agreement would be governed by German labor law, as expressly stated in cl 12.4, supported further by documented admissions of the respondent (RR 160 para 50.2 and RR 435). Clause 12.4 in crystal clear terms had provided:

> This contract is subject to German Labor laws.

[25] With the choice already freely made by the contesting parties, it was thus quite wrong for the learned judge to persist with the view that doubts still existed as to which law applied.

[26] To arrive at a finding that a case is arguable, let alone a good arguable case, a judge hearing a Mareva injunction application must assess the available evidence beforehand. Unless that is done, the presiding judge will be unable to decide whether the applicant has a fair chance of obtaining judgment, if the matter were to go for trial (*Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1; [1998] 4 CLJ 754). In *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398 Mustill J (QBD) had occasion to state:

> That the judge hearing a Mareva application is not only entitled but bound to make some assessment of the plaintiff's chance of success at the trial is, I believe, not open to dispute.

[27] The buyers had appealed against Mustill J's decision. In the course of dismissing the appeal, Kerr LJ had stated:

> It follows that the evidence, including the evidence on the second question posed by the judge to which we turn in a moment, must be looked at as a whole. A 'good arguable case' is no doubt the minimum which the plaintiff must show in order to cross what the judge rightly described as the 'threshold' for the exercise of the jurisdiction. But *at the end of the day the court must consider the evidence as a whole in deciding whether or not to exercise this statutory jurisdiction*. (Emphasis added.)

[28] In the appeal before us, in the grounds of judgment, the learned judge had authored:

> The plaintiff's case of good arguable case is premised on the contract of service …
>
> In essence the serious issue that needs to be addressed is whether there is a breach of the express and/or implied terms of the contract of service in terminating the plaintiff's employment through the notice of termination — exhibit JSH5 in encl 3 where termination not only goes against the grain of a long term contract as envisaged by the contract of service but also done in bad faith and not for just cause and excuse.

[29] A thorough perusal of the grounds of judgment revealed that there was absence of any finding of the chances of the respondent's case, and even if the grounds of judgment were not a talking judgment, the learned judge certainly had failed to assess the strength of his case. To wind this issue up, to be able to identify a serious issue, and to arrive at a conclusion whether a judge can rate an applicant's success after assessing the evidence adduced, are two totally different things. By his failure to assess the respondent's chances of success, the learned judge here could not have been able to decide whether the applicant had established a good arguable case or not.

[30] In the circumstances of the case, what with the misdirection and want of assessment, suffice if we stop here and refrain from delving into the merits of the case, in order not to hamper the trial judge when dealing with the trial proper.

ANY DANGER THAT WITH THE DISSIPATION OF THE ASSETS THE JUDGMENT WOULD BE LEFT UNSATISFIED

[31] A threshold that the respondent must also satisfy was whether there was any danger that the disposal of the assets would stultify the judgment. Be it intentional or that the effect of the disposal would stultify the judgment it must be established by the respondent. On this requirement the learned judge had made the following remarks:

> On the third requirement of removal of assets outside jurisdiction it is established through the defendant's own notification to one of its customers ABB Thailand through exhibit JSH8 in encl 3 of its intention to cease operations in Malaysia in March 2007 and there is no express rebuttal of the relocation of the operations to China by the defendant.

[32] Inexplicably, apart from the above excerpt, nothing was discussed about the danger of disposal of the assets defeating a judgment, a requirement that must be established as laid down by the *Aspatra Sdn Bhd* case. It is trite law that in order to succeed in a Mareva injunction application, dissipation of assets per se is incomplete unless the applicant also successfully establishes the fact that the dissipation are preemptive acts that would lead to an intentional stultifying of any judgment that may be obtained. The two ingredients must go hand in hand.

[33] It was never denied that the appellant had assets in Malaysia. Furthermore it was not denied that relocation to China was in the offing. Regretfully the learned judge had oversimplified matters by concluding that just because relocation was in the offing, even though openly admitted by the appellant, by the dissipation of the assets a default of a judgment must necessarily follow. That is not how the law works. First there must be a factual finding exercise. The learned judge needs to be subjectively satisfied that the injunction is to prohibit the dissipation of assets by the appellant in order to avoid any danger of the appellant defeating a judgment. Without that exercise how is the learned judge to be subjectively satisfied? Here he never undertook that exercise. Lawton LJ in *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645 had occasion to state:

> … there must be facts from which the commercial court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from jurisdiction …

A **[34]** The appellant is a company and has an ongoing business. It must be more profitable to go to China as that idea was mooted in its shareholders meeting as early as year 2000 (RR146), two years and ten months before the respondent was recruited and certainly years before the termination letter. We were eventually impressed that this relocation exercise was prima facie for a B legitimate purpose, let alone it would be absolutely unreasonable business wise to relocate its assets to China, merely to avoid paying a mere judgment whence in year 2006 its net assets stood at RM9,753,238 (RR 149). For all one knows the judgment may even go the way of the appellant.

C **[35]** This issue of relocation, which played a major role in the termination of the respondent, by our reckoning, would fall squarely within the ambit of cl 2.3 of the contract of service (see above). It certainly would qualify as 'important reasons prevail, through extraordinary termination' and therefore justify the termination of the respondent. We were not convinced that his D termination was a mala fide act; in fact we were satisfied that the exercise was in the best interest of the appellant company. Furthermore there was not a shred of evidence to establish that the disposal of the assets was with the intention of stultifying any judgment or with the effect of defeating a claim (see per Raja Azlan CJM in *Zainal Abidin v Century Hotel Sdn Bhd*, at p 264. E His Royal Highness had said:

> In our opinion the disappearance which the appellant fears in this case of the proceeds of sale does not come within the concept of disposing of assets *with the intention* or *with the effect of defeating a claim*. (Emphasis added.)

F

[36] That being so this panel was unconvinced that the respondent had successfully established the ingredients under this heading.

G **[37]** Based on the above reasons we had no hesitation in unanimously allowing the appeal with costs here and below. To regurgitate the learned judge had erred when:

(i) he equated 'a good arguable case' with a mere identification of a serious question to be tried (a test for an interim injunction under O 29 of the H Rules of the High Court 1980 at best), compounded by his failure to sift the evidence (leading to an inability to decide whether a good arguable case had been established); and

(ii) had failed to sift through the evidence adduced, thus denying him the chance to infer that the dissipation of the appellant's assets would lead I to a stultifying of a judgment.

[38] The consequential orders made by us were as follows:

(1) the order of the High Court be set aside;

(2) the deposit be refunded to the appellant; and

(3) matter be remitted to the High Court for damages to be assessed by the senior assistant registrar.

Appeal allowed with costs here and below.

Reported by Ashgar Ali Ali Mohamed